Upper Tribunal for Scotland

[2021] UT 7
UTS/AP/19/0007

DECISION NOTICE OF NIGEL ROSS

ON AN APPLICATION FOR PERMISSION TO APPEAL

(DECISION OF FIRST-TIER TRIBUNAL FOR SCOTLAND)

in the case of

MR EMRYS JONES, 30 Drumsmittal Road, North Kessock, Inverness, IV1 3JU

Appellant

and

ALLIED SOUTER & JAFFREY, Lyle House, Fairways Business Park, Castle Heather, Inverness, IV2 6AA

Respondent

FTT Case Reference FTS/HPC/PF/17/0108

22 July 2019

Decision

The Upper Tribunal, having reconsidered the decision dated 5 April 2019 to refuse permission to appeal, adheres to that decision and refuses permission to appeal.

Reasons

[1] This was a reconsideration hearing, rather than a full appeal, so reasons would normally be in outline only. However, I will give some further explanation of the earlier refusal, to meet the points made at the reconsideration hearing.

[2] The reconsideration hearing did not raise any new points. The appellant repeated points already considered by the Tribunal, and which were the subject of a lengthy and detailed decision dated 5 April 2019 to refuse permission to appeal. That feature alone would require this application to be refused, as no new arguments were presented, and the Tribunal has already dealt with the existing arguments.

[3] I will, however, refer to the main arguments in brief terms.

[4] The appellant places reliance on there being no assignation of the contract between the respondents and their successors. There are two errors here. First, there is virtually no evidence to show what did actually happen. Second, whether or not there was an assignation is in fact irrelevant – what is relevant is whether Rule 3.2 of the Property Factors Code of Conduct (the "Code") is triggered, thereby leading to the remedy which he seeks.

[5] First, without seeing the contracts, it is a matter of guesswork what happened on transfer of the factor's role. The appellant founds on two points, and describes them as hard evidence. They are not hard evidence because they require inference, and different inferences are possible. The first feature is that the terms of the "new" contract were different. The second feature is the refusal of the successor factors to give information about pre-appointment dealings.

[6] In relation to the first factor, one possibility is, as the appellant guesses, that the contract was not assigned, but instead came to an end. However, there is another possibility, namely that the remainder of the contract was assigned, and after assignation the new factor asked approval for new terms. The appellant agrees that new terms were in fact agreed at the next AGM some months later. Accordingly, two inferences are possible, neither (subject to what is said below) more likely than the other. The sparse facts support

either scenario. In relation to the second factor, that refusal is hardly surprising – a successor would not normally volunteer to be accountable for matters in which they played no part. That would be equally so whether there was a new contract or an old contract which was assigned. Accordingly, neither of these points is any more than neutral evidence.

[7] The appellant, in bringing the appeal, has the burden of proving the appeal. It is not enough that he makes guesses and then asks for these to be treated as firm facts. He has not proved his case.

[8] In any event, the surrounding facts are more compatible with assignation. If the contract had ended, there would be no dealings between the respondent and their successor. It would be a matter for the housing association to enter a new contract. There is no evidence that happened. The outgoing factor would not be "selling the factoring book" to a successor, but returning everything to the housing association. There is nothing illogical in the First-tier Tribunal's ("FtT") finding that there was an assignation. The respondent's position is that the contract was assigned.

[9] I have explained the foregoing because it was a source of some confusion at the hearing. However, as the FtT rightly held, it is irrelevant. That is because the trigger for the remedy sought is to be found in Rule 3.2 of the code. That rule does not mention assignation at all. It does, however, hinge on the words "the point of settlement of final bill".

[10] That is the trigger. There is no evidence of any settlement of a final bill. That is enough to dispose of this point. The FtT made no error. Rule 3.2 was never triggered, and no entitlement to repayment arose.

[11] In any event, if there was an assignation, there would never be a settlement of a final bill, because the successor factor would simply take over (and no doubt pay for) the predecessor's rights under the contract, and submit their own bill. Accordingly, the pre-

payment of bills, upon which the appellant relies heavily, is no more than the contract operating as it should. Such bills would simply continue to be paid to the successor, without a final bill ever being presented by the outgoing factor.

[12] Separately, and independently of the foregoing points, the clear purpose of rule 3.2 is to ensure that funds are protected. One risk to funds is that an outgoing factor retains funds. Rule 3.2 would prevent them doing so. There is no suggestion that occurred in this case. The purpose of rule 3.2 is not to compel a completely pointless carousel of funds when one factor takes over from another factor.

[13] So, for either of these reasons, the appeal is without merit.

[14] Another point was reference to "bad debt", which the appellant accepted simply meant "debt". He demands a certain standard of accounting, to include a statement of assets and liabilities. The FtT approved a different, less stringent, accounting regime. Both the appellant and the FtT were applying the same test, namely clarity and transparency.

[15] The short answer to this is that it is left within the discretion of the FtT to decide what level of financial reporting complies with this test (see section 20 of the Property Factors (S) Act 2011). It is a discretionary matter. It is not enough to simply disagree with it. It is necessary, for the decision to be appealed, to show that it is plainly wrong.

[16] It is not plainly wrong, because the homeowners are protected against debts, bad or otherwise, by a separate rule. An entire section, section 4, deals with debt recovery. The rules impose a regime. The FtT cannot be criticised for respecting that regime. Rule 4.6 imposes a requirement to inform homeowners about debt, but only where it "could have implications for them". That can only mean that, in short, where it is going to cost them money. There is no suggestion, despite the appellant's fears, that this has cost him, or any other homeowner, any money.

[17] There is good evidence that this regime works. The appellant spoke to asking for this information. He was given this information. There is nothing to stop him asking the same question at every AGM. There is no basis to assert that information is hidden. It is available on demand.

[18] The appellant placed reliance on rule 4.7. However, again, he has failed to consider what the trigger for that section might be. That rule imposes an obligation to be "able to demonstrate" (notably, not to "include routine reports in annual accounts" or similar) in certain circumstances. That only arises, however, "prior to charging those remaining homeowners". There is no suggestion, far less any evidence, that they have charged those remaining homeowners, so rule 4.7 is not operable.

[19] The appellant also criticises the decision not to enforce the PFEO, by compelling the respondents to produce figures which are now almost two years old. Without going into the detail, the appellant accepts that he received financial details. It is difficult to disagree with the FtT in finding that he is demanding information which he already has. Any order would achieve no practical purpose.

[20] Further, it is evident that the appellant has some dispute with those homeowners who are administering the residents' association. That is not a problem that the respondents can, or need, resolve. The appellant states that the chairman of the resident's association told the respondents not to include certain financial advice. No details of that issue are available, but the point is clear – it is not fair to criticise the respondents for complying with any instructions given by their clients. It is not for them to sort out any internal disputes.

[21] Further, the appellant places some emphasis on what behaviour the decision condones. The short answer is that any tribunal is charged with finding a practical resolution of legal issues, not making unnecessary orders to make a point. The FtT decided,

in effect, that not only was there no point to make, but even if there were an order would be pointless. Their decision is logical. Even if they could be criticised, it is a discretionary decision. They have not exceeded the bounds of their discretion. There are no grounds to challenge the decision.

[22] This appeal falls short, in every aspect, of an arguable appeal. I have set out the points, in somewhat truncated form. There is no stateable argument that the FtT erred. There is no stateable argument the Upper Tribunal wrongly refused permission.

[23] The respondent moved for expenses. An award of expenses is not normally made, and is only available if expense has been incurred which it would be unreasonable for that other party to pay. I have considered this. In my view, the appellant cannot yet be said to be acting unreasonably. He appeared and argued points which could not be described as wholly unreasonable, even if they were incorrect.

[24] I will therefore not make an award of expenses. However, the appellant has now had the benefit of a further hearing, and this note sets out the reasons for refusal. If he proceeds with this action to any other stage, in my view it would then become fair for him to assume the risk of being found liable in expenses.

Nigel Ross
Member